FILED
JUL 11 1955
HAROLD B. WILLEY, Clerk

No. 224

In the

Supreme Court of the United States

OCTOBER TERM, 1955

TRINITY UNIVERSAL INSURANCE COMPANY,
Petitioner and Appellant Below,

v.

CLYDE H. SMITHWICK,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WM. ANDRESS, JR.,
301 Blue Cross Building,
2208 Main Street,
Dallas, Texas.

JAY W. DICKEY,
414 National Building,
Pine Bluff, Arkansas,
Counsel for Petitioner.

WARLICK LAW PRINTING CO. - LAW BRIEF PRINTING - DALLAS - RI-6711

SUBJECT INDEX

	Page
Opinions of the Court Below	1-2
Jurisdiction	2
Questions for Review	3-5
Statutes Applicable	5-7
Facts of the Case	7-10
Argument	10-21
Appendix	23-38

Page

Advance-Rumley Thresher Co. v. Jackson, 287 U. S. 283, 77 Law Ed. 306 17

Baltimore v. Baltimore & Ohio Railroad Co., 10 Wall. 543, 19 Law Ed. 1043 13

B. & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 Law. Ed. 560 16

Bayside Fish Flour Co. v. Gentry, 297 U. S. 4222, 80 Law Ed. 772 17

Bradley v. Washington Steam Packet Co., 13 Peters 89, 10 Law Ed. 72 11

Bratton v. Chandler, 260 U. S. 110, 67 Law Ed. 157 17

Broadway v. The Home Insurance Co., 203 Ark. 126, 155 S. W. 2d 889 19

Brown v. Spilman, 155 U. S. 665, 39 Law Ed. 304 12

Burdon Central Sugar Refining Co. v. Payne, 167 U. S. 127, 42 Law Ed. 105 12

Calderon v. Atlas Steamship Co., 170 U. S. 272, 42 Law Ed. 1033 12

Chesapeak & Ohio Canal Co. v. Hill, 15 Wall. 94, 21 Law Ed. 64 11

Dermott v. Jones, 23 Howard 220, 16 Law Ed. 442 12

Drewnnen v. London Assurance Co., 113 U. S. 51, 28 Law Ed. 919 11

Eyre v. Potter, 15 How. 42, 14 Law Ed. 592 11

Green County v. Quinlan, 211 U. S. 582, 53 Law Ed. 335 12

Mauran v. Bullus, 16 Peters 528, 10 Law Ed. 1056 11

New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 35 Law Ed. 943 13

Page

Shepard v. Barron, 194 U. S. 553, 48 Law Ed. 1115 18

Standard Oil Co. v. United States, 221 U. S. 1, 55 Law Ed. 619 17

Twin City Pipe Line Co. v. Harding Glass Co., 285 U. S. 353, 75 Law Ed. 1112 17

Whitney v. Wyman, 101 U. S. 392, 25 Law Ed. 1050 11

Table of Statutes Cited

Title 28, United States Code 1254 2

Arkansas Statutes of 1947, § 14-604 ..... 5-6, 15

Arkansas Statutes of 1947, § 66-514 ..... 6-7, 18

No. .....

In the

Supreme Court of the United States

OCTOBER TERM, 1955

TRINITY UNIVERSAL INSURANCE COMPANY,
Petitioner and Appellant Below,

v.

CLYDE H. SMITHWICK,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

1.

OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the Eastern District of Arkansas is not reported in Federal

Supplement, but is found in the record at page 21. The opinion of the United States Court of Appeals for the Eighth Circuit is not yet reported, but is appended hereto.

2.

JURISDICTION

This Court has and should exercise its jurisdiction under Section 1254 of Title 28 of the United States Code, and Rule 19 of the Rules of this Court, to review the judgment herein because the Court of Appeals has decided a Federal and Constitutional question in a way in conflict with applicable decisions of this Court, in that it has denied to the parties to a contract the right to insert not illegal provisions therein, thereby revising the contract completely, without the presence of a party thereto, and for non-performance of such revised contract has penalized the Surety Company for penalty and attorney's fees under a statute not expressly so providing and never so construed by the highest court of that State. Furthermore, the Court sanctioned a departure from the accepted and usual course of judicial proceedings by the lower court, in permitting a plaintiff who did not plead performance of his contract but only completion of the construction work thereunder to recover without offering any evidence, and imposing the burden of disproof upon the defendant, which calls for an exercise of this Court's power of supervision.

The judgment sought to be reviewed was dated and entered on 2 May 1955, and a petition for rehearing was denied by an order dated 26 May 1955.

3.

QUESTIONS FOR REVIEW

Does a statute protecting suppliers of labor and materials, and permitting them to sue on surety bonds on completion of their work, prohibit a supplier from voluntarily contracting before beginning work that if 90% progress payments are made monthly, he will await payment of the retention until final acceptance and payment by the owner of the entire work done by the general contractor? If so, is it such a restraint upon their freedom of contract as to be unconstitutional?

When the parties agree that the sub-contractor shall do construction work and furnish lien waivers and maintenance bond, and that the general contractor shall pay 90% monthly and the balance in accordance with the prime contract which provides for final payment by the owner upon final acceptance, can the courts ignore the other provisions and revise the contract so as to require the surety to pay off the entire balance immediately upon completion of the construction work only?

Is a sub-contractor who does not plead performance of his construction sub-contract and offers no proof of any kind, entitled to recover his retentions from his contractee's surety without joinder of the contractee, when the owner's acceptance of the work is involved in other litigation, and such sub-contractor admittedly has not furnished written instruments required for payment, and owes large amounts to his materialmen?

When a sub-contractor has received $154,427.33 in monthly progress payments to which he would not be entitled except for a contractual provision for 90% progress payments and retention of the balance until final acceptance and payment by the owner of the entire work, can he then repudiate the retention agreement and recover the balance from the surety under a statute permitting suppliers to recover on completion of their work?

Under a penal statute subjecting insurance companies to penalties and attorney's fees for failure to pay policyholders their claims within the time specified in the policies, after demand therefor, is a surety upon a contractor's bond so liable to a third-party beneficiary thereunder in the absence of any demand and the non-maturity of the claim under the contract terms?

The sub-contractor Smithwick agreed with the general contractor, Lancaster & Love, to build $174,729.00 worth of pumping stations, a portion of a million and a half dollar contract the general contractor made to build a sewer system for the City of Pine Bluff. The prime contract provided for progress payments of 90% until acceptance by the engineer, when the 10% retention would be due, and the sub-contracts adopted and embodied the same provisions for payment to the sub-contractor Smithwick.

The City and its engineer have never accepted the work under the prime contract, or paid the retention, and the general contractor promptly filed suit, which was referred in March of 1953 by the United States District Court for the Eastern District of Arkansas to a Special Master, who

held hearings from September of 1953 to March of 1955, and is now preparing a report.

Accordingly, Lancaster & Love has never paid Smithwick, who had received his 90% progress payments in the amount of $154,427.33, but whose retention wasn't due until the engineer and the City accepted and paid Lancaster & Love.

Despite his voluntary agreement to wait for his retention until Lancaster & Love got paid, as a result of which he had collected his progress payments which he was only entitled to by virtue of that same voluntary agreement, Smithwick sued, not his contractual obligor, Lancaster & Love, but the surety on its bond, without prior demand or request for payment to the surety, probably for the purpose of adding penalty and attorney's fees which he could not even claim against Lancaster & Love, which was not made a party to the suit.

4.

STATUTES APPLICABLE

The applicable statutes are the following sections of the Arkansas Statutes of 1947:

> "14-604. Public Contractors' Bonds—Coverage. All bonds required by any commission or commissioners or board, or the agent or agents thereof, County Courts or Judges thereof, or any other public officer or officers for the construction of any public buildings, levee, sewer, drain, road, street, highway, bridge or other public buildings or works aforesaid, shall be liable for all claims for labor, material, camp equipment, fuel

including oil and gasoline, food for men and feed for animals, labor and material expended in making repairs on machinery or equipment used in connection with the construction of said public buildings or works aforesaid, lumber and material used in making forms and supports and all other supplies or things entering into the construction, or necessary or incident thereto, or used in the course of construction of said public buildings or public works; the bond shall also be liable to insurance agents for bond premiums and premiums for liability and workmen's Compensation insurance incident to the construction and proper protection of workmen, or laborers engaged in and upon the respective contracts. Said bonds shall also be liable for rentals on machinery, equipment, mules and horses used in the construction of said public building or public works aforesaid, and all persons holding such claims shall have a right of action on said bonds."

"66-514. Failure to Pay Loss—Recovery of Amount Due and Damages. In all cases where loss occurs and the cargo, fire, marine, casualty, fidelity, surety, cyclone, tornado, life, health, accident medical hospital, or surgical benefit insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve (12) percent damages upon the amount of such loss together with all reasonable attorney's fees for the prosecution and collection of said loss. This liability attached when liability is denied by the insurer and suit is filed. The attorney's fee shall be taxed by the Court where the same is filed on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law collected; and writs of attachment or garnishment filed or issued after proof of loss or death has been received by the company shall not defeat the provisions of this act (Section), provided the company desiring to pay the amount of the claim as shown in the proof of loss

or death may pay said amount into the registry of the court, after issuance of writs of attachment and garnishment in which event there shall be no further liability on the part of said company."

5.

FACTS OF THE CASE

The facts material to consideration of the foregoing questions are these, with appropriate record references:

Smithwick entered into six separate contracts all substantially in the same form (R. 11), as the one which appears in the record attached to the complaint (R. 6) for the construction of the pump stations and incidental work under a general contract between Lancaster & Love and the City of Pine Bluff. The sub-contract between Smithwick and Lancaster & Love provides in §1 that the general conditions, drawings and specifications in connection with the prime contract are a part of this contract; in §4 that Lancaster & Love agrees to pay Smithwick in accordance with the terms and condition of §7 of Project 1 of the prime contract; in §5 that the terms of the prime contract are made a part of the sub-contract and particularly §7 regarding payment. In §5 also Smithwick agrees to furnish a maintenance bond, for one year from the date of completion of the job, and Lancaster & Love agreed to pay 90% of the work accomplished upon each estimate which is to be made in time for Lancaster & Love to use it in making their estimates to the City. In §3 Smithwick agrees to furnish labor and materialmen's lien waiver upon com-

pletion of the job, and to secure written approval of the work from the contractor before final payment is made.

Appellant Trinity Universal Insurance Company executed a surety bond in the amount of $1,527,071.81 on the prime contract to the City of Pine Bluff (R. 4), providing that unpaid claims for material, labor, and supplies should have a right of action thereon, postponed until all claims of the City of Pine Bluff had been in full (bottom of R. 5).

In his complaint, Smithwick did not plead performance of the contract, but simply pleaded that the work which he had agreed to construct had been completed, in paragraph 8 (R. 2). He did plead that Lancaster & Love had failed and refused to pay the balance, and was bankrupt (which bankruptcy was subsequently reversed and dismissed), but did not plead any demand upon appellant surety (R. 3). He admitted receipt of progress payments in the amount of $154,427.33 on a total consideration as adjusted of $175,328.51, and after an additional credit, claimed a balance of $20,533.61, for which he sought judgment against Trinity Universal Insurance Company alone (R. 2).

Because the complaint failed to alleged performance of the contract, and the doing of any of the things precedent to payment other than the accomplishment of the construction work, Trinity pleaded that the complaint failed to state a claim against it upon which relief could be granted, alleged that the sum claimed was not yet due because Smithwick had agreed to wait until the City paid Lan-

caster & Love, and that that work and that claim under the general contract was in litigation (R. 13-14).

Despite the failure of Smithwick to plead performance of the contract, and despite the pleading by Trinity that the amount claimed was not yet due, the trial court placed the burden upon the defendant Trinity to prove that Smithwick had defaulted in doing the work (R. 31).

Trinity then called Smithwick adversely and he admitted that he had not paid all bills for labor and materials, but still owed approximately $17,000.00, and had not furnished the labor and materialmen's lien waiver provided for by §3 of the sub-contract, nor had he received written approval of the work from any one (R. 32). He further testified that he had heard about the litigation between the City of Pine Bluff and Lancaster & Love, and understood the system had not been accepted under the contract (R. 33). He also admitted that he had not furnished any additional bonds other than the original surety bonds furnished at the time of execution of the contract but it was his understanding that they included the one year maintenance bond, although the bonds were not offered in evidence (R. 50-51).

There was no proof of any demand made upon Trinity, nor was there any proof of any waiver or agreement by Lancaster & Love not to require labor and materialmen's lien waivers, written acceptance, or the maintenance bond, or of any other obligation by Lancaster & Love to pay Smithwick except in accordance with the provision of §7 of the specifications of Project 1 under the prime contract,

providing for final payment upon inspection and final acceptance by the owner, the City of Pine Bluff.

6.

ARGUMENT

The Court of Appeals assumed that which was necessary to be proved, taking the position that because it was admitted that the plaintiff's work was completed, it was also admitted that he was entitled to payment, which it was not; and because this was a public contract where the suppliers could not actually fix liens, and because more than a year had passed since the completion of the work, that Court treated the requirements of the contract for the furnishing of the lien waivers, of the maintenance bond, and of written approval, by the contractor, as matters of no moment.

The legal excuses which the Court of Appeals found here were matters that were known to the parties when, in their own best judgment, they contracted that Smithwick would furnish the lien waivers. All parties knew that this was a public contract, but if Lancaster & Love wanted lien waivers, and Smithwick was willing to agree to furnish them, it is not the business of the Court of Appeals or of the trial court to re-make the contract for the parties. If Lancaster & Love had chosen to demand that all of the work should be done by left-handed men with only one eye, and Smithwick had agreed to have the work performed by left-handed men with one eye, they were free to contract on that basis and to put that into the contract, and unless there was

something illegal about it, the Court is in error in re-making the contract for them, and in restraining their freedom to contract.

The parties, if competent and willing to contract, are the only proper judges of the motive or consideration operating upon them. *Eyre v. Potter, 15 How. 42, 14 Law Ed. 592.* It is a cardinal rule in the construction of all contracts, that the intention of the parties is to be inquired into, and, if not forbidden by law, is to be effectuated. *Bradley v. Washington Steam Packet Co., 13 Peters 89, 10 Law Ed. 72; Mauran v. Bullus, 16 Peters 528, 10 Law Ed. 1056; Chesapeake & Ohio Canal Co. v. Hill, 15 Wall. 94, 21 Law Ed. 64.*

Nor can the want of business sagacity in an arrangement affect the interpretation of the written agreement between the parties. *Drewnnen v. London Assurance Co., 113 U. S. 51, 28 Law Ed. 919.* The meaning of the contracting parties is the contract. *Whitney v. Wyman, 101 U. S. 392, 25 Law Ed. 1050.*

Under the contract, Smithwick had four things to do: Perform the construction work, get a written acceptance of it, furnish a waiver of lien from the people he had done business with, and give a maintenance bond good for a year. He did only one of these, the construction work. He never got the work accepted, he didn't furnish a waiver of liens and in fact still owes $17,000.00 to his suppliers, and there is no showing of his having furnished any maintenance bond. All of these were parts of the contract, and he had to do all of them before he would be entitled to full

payment over and above the $154,000.00 he has already received. *Dermott v. Jones, 23 Howard 220, 16 Law Ed. 442.*

In construing the contract, effect should be given to all of its language. *Brown v. Spilman, 155 U. S. 665, 39 Law Ed. 304.* A contract must be so construed as to give meaning to all its provisions and an interpretation is incorrect which obliterates one portion of the contract in order to enforce another part thereof. *Burdon Central Sugar Refining Co. v. Payne, 167 U. S. 127, 42 Law Ed. 105.* The whole instrument should be considered, and not just single words, phrases or sentences. *Green County v. Quinlan, 211 U. S. 582, 53 Law Ed. 335.*

While in cases of ambiguity, the intention of the parties will be considered, and the instrument will be construed against the one who wrote it, where the language is clear and explicit there is no call for construction, and this principle does not apply. *Calderon v. Atlas Steamship Co., 170 U. S. 272, 42 Law Ed. 1033.*

So there is no cause for construction in this case. There is a clear agreement by Smithwick that he will furnish the lien waiver, even upon a public contract where liens could not be fixed against the property. There is a clear agreement on his part that he will secure written acceptance and approval, and, while of course an arbitrary refusal to accept may always be shown, he makes no attempt to account for the lack of the acceptance. He further clearly agrees to furnish the maintenance bond, and it is not for the court to determine whether those provisions were of

importance to Lancaster & Love in entering into the contract with Smithwick or not, because, as this Court said in *Baltimore v. Baltimore & Ohio Railroad Co., 10 Wall. 543, 19 Law Ed. 1043*, it is always competent for parties capable of entering into a business arrangement to fix the terms of it and to declare what shall be their respective rights and liabilities under it, and if this has been done, the Courts must give effect to the contract as made by the parties even though, in the absence of a special arrangement upon the subject, the rule to determine the rights of the parties might have been different; and the courts have no power to make new contracts, or to impose new terms upon parties to contracts without their consent, but are limited to the power of fixing the rights of the parties to contracts already existing, as this Courts aid in *New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 35 Law Ed. 943.*

Furthermore, in this case the action of the lower courts goes one step further. It is an attempt to modify and revise an existing contract without one of the parties even being present. From the beginning we have urged that Lancaster & Love was a necessary party to this law suit, but because of the fact that the Arkansas courts hold that suits can be brought by suppliers against the surety without a joinder of the principle, our contention has been overruled. The lower courts failed to make the distinction between suing the surety on its bond, which can be done, and construing the meaning and intention of a contract between two parties without joining the other contracting party in the law

suit. In order to arrive at their decisions in favor of Smithwick, the lower courts had necessarily to determine that Smithwick and Lancaster & Love didn't intend what the writing said, that Smithwick would furnish lien waivers and a maintenance bond, and would be paid on acceptance and final payment by the owner, and they have made that determination without the other party before them, without giving that party an opportunity to present its version, and without binding that other party, Lancaster & Love—and the surety company only owes what that missing party owes.

What right do the lower courts have to say, without Lancaster & Love present before them, what was and was not important or trivial in the contract between Lancaster & Love and Smithwick? There were six pump stations to be built—if Smithwick had built only five, could the courts have said, in the absence of Lancaster & Love, that he had fully performed and was entitled to payment, because the sixth pump station wasn't important? What more right do they have to say that Lancaster & Love's requirement of a lien waiver wasn't important, just because this was a public job? Smithwick and Lancaster & Love both knew that this was a public job when they contracted, and they knew, too, that his suppliers wouldn't have furnished waivers until they were paid, so if Lancaster & Love chose that method of assurance that all his bills were paid, what right have the courts to substitute their ideas of an appropriate form of contract for that which the parties selected, in the absence of one of them, and in the face of the vindicating

testimony that Smithwick still actually owed $17,000.00 to his suppliers, for which they could bring their own actions against Lancaster & Love and the surety company, and thus make the latter pay twice?

Unless it is a matured obligation by Lancaster & Love under their contract with Smithwick, the surety company should not be liable, because they simply guaranteed the performance of the Lancaster & Love contract. All that Smithwick can collect from the surety company on the principal of his claim is what he is entitled to collect from his contractee, Lancaster & Love, and has not already collected. While the surety company may be primarily liable, in the sense that it can be sued directly on the bond, it is still obligated only to pay those debts which its principal is already obligated to pay and has not, and unless and until Smithwick has shown a matured and defaulted claim against Lancaster & Love, he cannot recover against the surety, and assessing the surety with penalty and attorney's fees without showing the matured and defaulted obligation by its principal, and a demand on the surety to make good for its principal's default, is, as we shall hereafter show, a taking of its property without due process.

The right to sue directly on the bond without the joinder of Lancaster & Love affects the remedy only, but it does not increase the liability of the surety.

The Court of Appeals further held under §14-604 of the Arkansas Statutes, above set forth, that Smithwick became entitled to all of the balance of his money when he completed the work. The Statute has been construed by the

Arkansas Courts as being for the protection of suppliers on public works, and has also been construed to entitle them to payment when their work has been completed, and as not requiring them to await final acceptance of the entire work by the owner. The cases so construing, however, have not been cases wherein the claimant had made contractual arrangements as to when he should be paid, and by virtue of such contractual arrangements had received 90% of the work done long before completion, and agreed to await the final payment until acceptance of the entire job.

Under the Arkansas Statutes, the claimant is entitled to 100% of his money when the work is finished, and is not entitled to any of it before, or any of it later. There is nothing in the statute which provides that it shall be the exclusive way in which suppliers shall be paid, and there is nothing there which says that the parties cannot agree that, in consideration of the payment of 90% before completion date, there may be a deferral of the remainder until some later date. It is only by the construction placed upon that statute in this case that any such restraint upon the freedom of contract is read into that statute, and it is not necessary to be so read into it.

As the right of private contract is no small part of the liberty of the citizen, the function of the courts is to maintain and enforce contracts rather than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare. *B. & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 Law Ed. 560.* It is only because

of the dominant public interest that one who has had the benefit of performance by the other party will be permitted to avoid his own promise. *Twin City Pipe Line Co. v. Harding Glass Co., 285 U. S. 353, 75 Law Ed. 1112.*

Now, the Arkansas Statute does not say that any other arrangements between contracting parties sui generis shall be void insofar as the method of payment is concerned, and in view of the rule that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score, as this Court said in *Bratton v. Chandler, 260 U. S. 110, 67 Law Ed. 157*, we do not think any such construction as was placed upon that statute by the courts in this case is tenable.

We say that because this Court has so many, many times held that freedom to contract is a valuable constitutional right of Americans. *Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 Law Ed. 772; Standard Oil Co. v. United States, 221 U. S. 1, 55 Law Ed. 619;* and many other cases. As said in *Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283, 77 Law Ed. 306*, the exercise of legislative authority to abridge freedom of contract can be justified only by the existence of exceptional circumstances.

There are certainly no such exceptional circumstances shown in the instant case, nor in connection with the Arkansas statutes. We have here a case where a man has received $154,000.00 before the completion date of his work, which he would not have been entitled to receive under the statute enacted for his protection, and the inter-

est on that sum of money for the period of time that he had it before completion of the work, and the use of it in the financing of the job, alone amounts to substantially what the present litigation is about. As a part of the same contract under which he received $154,000.00 worth of benefit, he agreed to defer payment of the remaining $20,000.00 until his contractee was paid by the owner, and having accepted the benefits of the contract, we say that he cannot now repudiate, and if the Arkansas Statute may be properly construed as justifying his position without consideration of his contract, and is a valid enactment under such restrictive construction, nevertheless by accepting the progress payments he has waived his rights under the statute, as this Court has said that he can do, in *Shepard v. Barron, 194 U. S. 553, 48 Law Ed. 1115.*

With reference to the assessment of penalty and attorney's fees against the petitioner herein, done under the guise of compliance with §66-514, above set forth, there is no decision by the Supreme Court of Arkansas construing that section of the statute to be applicable to a surety upon a contractor's bond. The statute itself does not mention surety bonds, and only says that a surety company may be liable for failure to pay a claim within the time specified in the policy, after demand made therefor. The terms "policy" and "holder" used in that statute are not customarily used in connection with bonds, but are used in connection with insurance policies.

This statute has been construed by the Supreme Court of Arkansas as being highly penal, and it has been held by

that Court that it must be strictly construed, in *Broadway v. The Home Insurance Co., 203 Ark. 126, 155 S. W. 2d 889.* The construction placed upon the statute by the lower courts in this case is not a strict construction but is definitely a loose construction, if it cannot be more properly referred to as an imaginative construction.

In order to mulct Trinity out of the additional $7,500.00 in this case, it is first necessary for the Court to hold that a surety bond is an insurance policy, that a third-party beneficiary not even named in the bond is the holder thereof (thereby making it possible to have hundreds of holders, every day laborer and every person who supplies any materials), and then to fix a time for payment by another wholly unrelated statute, not specified in the bond or the policy. This is even worse than the piling of presumption upon presumption, or Ossa upon Pelion.

Furthermore, the statute provides that the liability for the penalty and attorney's fees attaches when liability is denied by the insurer and suit is filed, and that it shall be after demand has been made therefor. There was no demand in this case, and there was no denial of liability by Trinity. To this good day, Trinity does not deny liability —it denies the obligation to make the payment until after the question of the acceptability of Smithwick's work has been fixed, either by acceptance by the City of Pine Bluff, or by judgment in favor of Lancaster & Love against the City of Pine Bluff to the effect that the work is satisfactory and should be paid for, whether the City of Pine Bluff

is willing to accept it or not. Then, and not until then, will Smithwick be entitled to collect any more money. If the City of Pine Bluff is successful in its litigation in fixing liquidated damages against Lancaster & Love for failure to complete the contract within the time limited, then Lancaster & Love has the right, under its contracts with Smithwick, to collect liquidated damages from him, $50.00 per day under each of the six contracts. (R. 8, top of page), and when that has been determined and the accounts adjusted between Lancaster & Love and Smithwick, then Lancaster & Love is obligated to pay Smithwick whatever balance may then be owing him, and if it fails to do so, Trinity is liable upon the bond.

When $7,500.00 is taken away from Trinity by assessment of penalty and damages, ostensibly under a statute which does not expressly so state, nor do so by necessary implication, and which has never been so construed by the highest court in the State, and when no demand was made upon Trinity prior to the filing of the suit, we submit that it is a taking of property without due process of law, and that since attorney's fees and penalty are not ordinarily chargeable in the absence of statute, there is no justification for such judgment, and it should be corrected.

Wherefore your petitioner prays that a writ of certiorari be granted, as provided in Rule 25, and that this cause be reviewed and determined by this Court as provided for by the laws of the United States, and that the judgment herein

of said Court of Appeals be reversed by this Court, and for such other relief as to this Court may seem proper.

Dated this 11th day of July, 1955.

WM. ANDRESS, JR.,
301 Blue Cross Building,
2208 Main Street,
Dallas, Texas.

JAY W. DICKEY,
414 National Building,
Pine Bluff, Arkansas,
Counsel for Petitioner.

APPENDIX

(Opinion.)

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 15,199

Trinity Universal Insurance Company, Appellant,

vs.

Clyde H. Smithwick, Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[May 2, 1955.]

William Andress, Jr. (Jay W. Dickey was with him on the brief), for appellant.

R. C. Limerick, Jr. (W. H. Rector was with him on the brief), for appellee.

Before SANBORN, COLLET and VAN OOSTERHOUT, Circuit Judges.

COLLET, Circuit Judge.

Clyde H. Smithwick a sub-contractor of Lancaster and Love, Inc., recovered a judgment for the balance due on

his contract with Lancaster and Love against the defendant Trinity Universal Insurance Co., a Texas corporation, which had executed a bond insuring subcontractors the amount due them from Lancaster and Love. Trinity appeals. The assignments of error require a rather detailed statement of the facts.

On April 16, 1951 the City of Pine Bluff, Arkansas and Lancaster and Love executed a general contract by which the latter as the prime contractor agreed for the price $1,527,071.81 to construct certain sewer improvements in the City of Pine Bluff. The prime contractor had the right under the contract to sublet the work. It did sublet to plaintiff the construction of six pump stations for the aggregate sum of $174,729.00 by six separate subcontracts. The subcontracts provided that the stations should be completed within 180 days from the time work was begun. Work was to begin within 10 days from the date the prime contractor issued a work order to plaintiff. The work order was issued June 1, 1951.

The subcontracts further provided that in the event the work was not completed within 180 days the plaintiff was to pay the prime contractor the sum of $50.00 for each day required in excess of 180, "provided however, (if) materials (were) not available, the liquidated sum enumerated herein shall be waived."

It was further provided that the plaintiff should not be liable for any liquidated damages caused by reason of the delay of the prime contractor.

The defendant executed its bond April 16, 1951 insuring the performance of the general contract by the prime contractor. Defendant's bond inured to the benefit of plaintiff as a subcontractor insuring to plaintiff the payment of all sums due him from Lancaster and Love, the prime contractors.

When Lancaster and Love proffered the completed job to the City a controversy arose between them concerning the work and it was not accepted by the City. Lancaster and Love brought suit in the United States District Court for the Eastern District of Arkansas against the City for the contract price. The City brought Trinity into the case. Both Lancaster and Love and Trinity by their pleadings in that case asserted completion of the entire contract, including plaintiff's subcontracted portion of the work in accordance with the terms of the general contract. That suit was filed November 7, 1952, and according to the briefs was referred to a special master before whom it is still pending.

Plaintiff filed the present action on August 4, 1953 against Trinity and the City in the Arkansas State Court. The complaint alleged the execution of the general contract between the City and Lancaster and Love, the execution of the bond by Trinity, and the execution and performance of the six subcontracts by plaintiff. It was alleged in paragraph 8 that—

"8. The work which plaintiff agreed to construct under the terms of said contracts dated April 30, 1951, has been fully completed and has been accepted by the City of Pine Bluff and is now being used by said City of Pine Bluff."

The complaint further alleged that the original contract price had been increased $599.51 to a total of $175,328.51, that $154,427.33 had been paid and certain work of the value of $367.50 omitted, leaving a balance due plaintiff of $20,533.61 for which it prayed judgment against Trinity and the City. Trinity's "Contractor's Surety Bond" and plaintiff's six subcontracts were attached to the complaint as exhibits and made a part of the complaint. The cause was removed to the United States District Court for the Eastern District of Arkansas. The defendant Trinity answered asserting in general terms that the complaint failed to state "a claim against this defendant upon which relief can be granted," alleged that Lancaster and Love was a necessary and indispensable party, admitted the execution of the general contract, the execution of Trinity's bond, and the execution of plaintiff's six subcontracts. Referring to paragraph 8 of the complaint (quoted above) Trinity's answer stated:

"This defendant admits the allegations of paragraph 8 of said petition except the allegation that the work 'has been accepted by the City of Pine Bluff,' and in this (fol. 13) connection says that while it believes as a matter of law that such work has been accepted by the City of Pine Bluff, there is presently pending litigation in cause No. 2481, hereinafter more fully set out, where the City of Pine Bluff denies that it has accepted the work of the plaintiff herein."

Paragrapt 9 of the Complaint contained the allegations above referred to of the amount of plaintiff's contract price, the payments and credit and the amount due plaintiff. Answering that paragraph Trinity stated that it ad-

mitted those allegations except the allegation that "the sum claimed is now due." In that connection Trinity alleged:

"that under the plaintiff's contracts the balance owing is not due until such time as the entire sewer system of the City of Pine Bluff has been accepted by the owner (the City) and the owner (City) has paid the retained percentages to the prime contractor, Lancaster and Love, Inc., at which time the sum owing by Lancaster & Love, Inc., to plaintiff will become due."

Trinity further admitted that the City had received the benefit of the work performed by plaintiff, admitted that the reasonable value to the City of plaintiff's work was as plaintiff alleged, and admitted a balance owing to plaintiff of $20,533.68. The answer then asserted that the action was prematurely brought in that Lancaster and Love were not obligated to pay plaintiff until it had been paid by the City, that since the City and Lancaster and Love were involved in litigation there was no obligation on the part of Lancaster & Love or Trinity to pay plaintiff until such time as plaintiff's work had been "accepted and paid for by the City."

Trinity then alleged that the City was in the other case claiming liquidated damages from Lancaster & Love under the general contract—"and in the event they (the City) are successful in that cause, the claim of plaintiff herein will be entitled to be offset for liquidated damages in an amount then to be determined." The prayer of the answer was that the cause be abated "until all necessary parties are before the court" and until the determination of the

litigation between the City and Lancaster and Love, or that this cause be consolidated with the other action.

After Trinity's answer was filed the cause was remanded to the State Court upon the motion of the City. Upon becoming reinvested with jurisdiction of the cause the State Court on motion of the plaintiff, Smithwick, struck from Trinity's answer the allegation that Lancaster & Love was an indispensable and necessary party to the action; the allegation that under plaintiff's subcontracts the balance of $20,533.68 owing to him was not due until such time as the entire sewer system had been accepted by the City and the City had paid Lancaster & Love, and; the denial by Trinity of any contractual obligation to plaintiff under Trinity's bond.

The State Court then sustained the City's demurrer to plaintiff's complaint and dismissed the action as to the City. Thereupon on motion of Trinity, the only remaining defendant, the cause was again removed to the United States District Court for the Eastern District of Arkansas. Trinity then sought by amendment of its answer in the United States District Court to restore the portions of its original answer which had been stricken by the State Court. This motion was denied.

When the cause came on for trial before the court, (a jury was waived) and after counsel for both parties had made their opening statements the court held that the only disputed question was whether liquidated damages should be deducted from plaintiff's claim and that the

burden was upon Trinity to sustain its claim to such a deduction. The trial then proceeded. All that the record before us shows concerning the opening statements of counsel and the action of the court in this regard is the following:

"Upon opening statements of counsel as to the condition of the pleadings, the court held that the only question left was the question of liquidated damages and that the burden shifts upon the defendant to prove that the plaintiff had defaulted in doing the work, to which defendant excepted."

Trinity treats the action of the trial court reflected in the above quoted paragraph as the entry of a summary judgment in favor of plaintiff and upon that premise argues that a summary judgment could not have been properly entered. But this record does not justify us in accepting the correctness of that premise. The more appropriate interpretation of the record is, as the quoted language indicates, that the court in the light of counsels' analysis of the pleadings, reached and stated the conclusion that the only issue in dispute for the court's determination was the question of liquidated damages and that the burden of proof thereof was on Trinity. Whether Trinity excepted to the conclusion that such was the only issue is by no means clear, since from the quoted language the exception could have applied only to the ruling that the burden was upon Trinity to establish its right to deduct liquidated damages. What representations were made to the court by counsel in their opening statements there is no indication.

We do not imply that counsel have in the preparation of the record misinterpreted or misstated their interpretation of the court's ruling. But we will not assume as a premise that the trial court entered a summary judgment or made a ruling tantamount thereto unless sufficient appears in the record for us to justify that assumption. Furthermore it could not have been a summary judgment under Rule 56 Federal Rules of Civil Procedure. Nor was it a judgment under Rule 54(b) of those Rules.

The question therefore is whether the conclusion stated and the action taken constituted prejudicial error. The practicalities of the situation are of some importance. The case was being tried by the court without a jury. Counsel made their opening statements for the purpose of outlining their respective positions, the issues involved, and the general nature of the evidence in support of their respective positions. Those statements were for the purpose of enlightening the court, not to conceal latent or hidden issues embraced within a possible but non-apparent interpretation of the pleadings. A reasonable and fair interpretation of the pleadings justified the trial court in reaching the conclusion that there was no real dispute about the plaintiff's right to recover subject to possible deduction of liquidated damages.

The burden of proof on the question of whether Trinity was entitled to charge plaintiff with liquidated damages was Trinity's burden. It was not incumbent on plaintiff to prove that which the pleadings had admitted—that the plaintiff's work was completed and that he was entitled

to payment. If the amount demanded was to be reduced by the assessment of liquidated damages it would be because Trinity pleaded and established that affirmative set-off or defense.

The claim now made as a defense to plaintiff's right to recover that plaintiff furnished no labor and materials lien waivers, that plaintiff had not obtained the written approval of his work by the prime contractor, and had not furnished a maintenance bond for one year was not asserted by Trinity either in its original answer, in its requested amendment thereto, or in any manner prior to the ruling complained of.

The trial court was justified in assuming, absent some assertion to the contrary, that those matters were not in dispute. And even if it could be said that technically they were facts which plaintiff was required to establish as a prerequisite to his right to recover, they were sufficiently established or excused by the testimony of plaintiff who was called as a witness by Trinity and was the only witness who testified.

As to the labor and materials lien waivers it was undisputed that the work was a public improvement for which laborers and material men had no lien. *Johnson* v. *Flynn* 15 S. W. 2d 327, *Holcomb* v. *American Surety Co.*, 42 S. W. 2d 765. And plaintiff testified that he furnished a surety bond to secure the payment of claims for labor and materials furnished to him under the subcontracts. As to the necessity for the written approval of Lancaster & Love,

the prime contractors, the pleadings and the evidence showed that Lancaster & Love declined to pay plaintiff for the sole reason that the City had not paid it. There was no provision in plaintiff's subcontracts definitely fixing the time for final payment by the prime contractor to subcontractors.

The Supreme Court of Arkansas held in *Friedman* v. *Schlenter*, 151 S. W. 696, that in the absence of any provision in the contract on the point, the time of making payment is presumed to be the completion of the work. The complaint alleged that the work had been fully completed. The answer admitted the allegation. If Lancaster & Love based their refusal to pay plaintiff upon a misconception of the law, believing that acceptance of the work and payment by the City was a prerequisite to plaintiff's right to payment, its failure to give plaintiff a written approval upon those grounds was arbitrary and would not defeat plaintiff's right to recover.

The trial court was justified from the pleadings and the evidence in concluding that that was the sole reason for the lack of a written approval from Lancaster & Love. Acceptance and payment by the City was not a valid ground for Lancaster & Love's refusal to pay plaintiff. *National Lbr. & Creosoting Co.* v. *Mullins*, 59 S. W. 2d 493; *Detroit Fidelity Surety Co.* v. *Yaffe Iron & Metal Co., Inc.*, 44 S. W. 2d 1085.

As to the one year maintenance bond, plaintiff testified that it was his understanding that the bonds included the one year maintenance bond. There was no evidence con-

tradicting or challenging this testimony. Furthermore, plaintiff's suit was filed more than one year after the work was completed, the trial was more than two years thereafter and there was no indication of any claim for maintenance. These defenses were not of substance. Nor were they meritorious.

Trinity contends there was no evidentiary support for the court's findings that its right to liquidated damages had not been established. This contention involves the further contention that many exhibits were erroneously admitted without proper identification, were pure hearsay evidence, and constituted the evidentiary basis for those findings.

Trinity sought to show by plaintiff that the subcontracts were not completed within the time allowed by the subcontracts. The contracts were in evidence. They provided, as heretofore noted, that if materials were not available or the delay was caused by the prime contractor, plaintiff should not be liable for liquidated damages. A large part of the documentary evidence, the admission of which is now assailed, bore upon the availability of materials. A portion of it related to delay of the prime contractor. We need not pass upon its admissibility for the reason that if there was other competent evidence to sustain the court's findings it will be assumed that the court based its findings on the competent evidence. *Builders Steel Co.* v. *Commissioner*, 179 F. 2d 377. There was such other evidence. The plaintiff testified without objection that the materials were not available, the length of time they were not available and the

delays caused by the prime contractor. There was adequate evidence to support the findings and none to the contrary.

Trinity contends that plaintiff waived his right under the Arkansas Statute to payment on completion prior to payment to Lancaster & Love by the City. Its argument is that under the Statute plaintiff would not have been entitled to any payments until the work was completed, that since plaintiff by his sub-contracts obtained the benefit of the payments being made periodically as the work progressed on estimates of partial completion he substituted the method and time for payment specified by the sub-contracts for his statutory right and thereby waived the latter. Trinity then asserts that the sub-contracts read with the general contract provide that payment was not due plaintiff until the City accepted the entire job and paid Lancaster & Love.

The Arkansas Statute involved, § 14-604 et seq. Ark. Statutes of 1947, required the giving of Trinity's bond. The bond was held in *Detroit Fidelity & Surety Co.* v. *Yaffe Iron & Metal Co.*, 44 S. W. 2d 1085 to be for the protection of furnishers of labor and materials and should be construed liberally to effectuate that purpose. The Arkansas Supreme Court then went on to say:

"The law requiring the bond to be executed to cover liabilities in accordance with the terms of the statute, the principal and surety, even by express terms of the bond, could not limit or restrict their liability by employing or omitted to include therein the terms of the statute."

Lancaster & Love and Trinity could not therefore by contract limit their liability to plaintiff fixed by the statute.

But Trinity asserts something somewhat different, i.e., that plaintiff could, and did, by contract waive his rights under the statute. Generally speaking, as Trinity asserts, a person may by contract waive a right given him by law so long as the waiver does not run counter to public policy or public morals.

Assuming for present purposes only that such a waiver by plaintiff would not be contrary to the public policy of Arkansas and that plaintiff could by express contract waive his rights under the Arkansas Statute and agree that his compensation should not be due until the City paid Lancaster & Love, in doing so he would be waiving practically all of the benefit of the statutory bond. *Nat'l Lumber & Creosoting Co.* v. *Mullins*, 59 S. W. 2d l. c. 495. See also *Holcomb* v. *American Surety Co.*, 42 S. W. 2d 765. Such waivers are not favored by the law and will not be implied or enforced without a showing of a clear intent to relinquish statutory rights. The asserted waiver is based upon the assumption that plaintiff impliedly gave up his right to the protection of the bond for the privilege of being paid periodically on partial completion estimates. But the practice of paying subcontractors in that manner is not an unusual one when the protection of a bond is also present. It would be unreasonable to assume that a waiver was intended for that reason.

A further reason for enforcing the waiver is advanced that plaintiff by agreeing in the sub-contracts that the provisions of the general contract should be binding upon him, thereby agreed that a provision in the general contract

that Lancaster & Love should not be entitled to final payment of their retained percentages from the City until final inspection and acceptance by the City, should also apply to the payment of plaintiff's final percentages. A buildup of intention in such a tenuous manner does not meet the requirement that a clear intent for a waiver must be shown.

Trinity assumes that the trial court denied its proffered amendment restoring the defenses stricken by the State Court upon the ground that the action of the State court was final and had become the law of the case. That the defense of non-maturity of plaintiff's claim and that the action was prematurely brought were properly stricken under the law of Arkansas has been demonstrated. Sufficient ground for refusal to permit the amendment therefore existed.

The defense, or plea in abatement, based upon the premise that Lancaster & Love was a necessary and indispensable party is also untenable. The same question arose in *Holcomb* v. *American Surety Co.*, 42 S. W. 2d 765. The Supreme Court of Arkansas said:

"The third ground of appellee's demurrer was that there was a nonjoinder of necessary parties, in that the contractor was not made a party and section 6919 of the Digest is invoked as authority for the position taken. This section provides that, in all cases where a lien shall be filed under the provisions of the act by any person other than a contractor, it shall be the duty of the contractor to defend the action at his own expense. The act referred to in 6919 was one enacted for the benefit of laborers or other persons who should do work for private individuals or corporations, giving them a lien upon the building, erection, or improve-

ments, etc. This statute has no application to the instant case, as the construction in question was of a public nature upon which there could be no liens and the rights of the persons performing the work or furnishing material must be found in the bond given for their protection. This bond, which is hereafter set out, entitles the beneficiaries—the laborers and materialmen—to an action against the obligors. *Oliver Construction Co.* v. *Williams*, 152 Ark. 414, 238 S. W. 615. Clark was a proper, but not a necessary party."

The trial court allowed plaintiff the statutory penalty and an attorney fee under Section 66-514 of the Arkansas Statutes of 1947 which provides for such an allowance against surety companies and others for failure to pay claims within the time specified in the policy or bond "*after demand made therefor.*"

Trinity contends there was no demand such as the statute required and for that reason the allowance was improper. There is some variety of opinion on the question of whether the filing of a suit without prior formal demand will satisfy a statutory requirement for a demand. Trinity cites several cases in which the filing of a suit without prior demand was held to be insufficient. Noteworthy of those is the Texas case of *Metropolitan Life Ins. Co.* v. *Wann*, 109 S. W. 2d 470. In Texas under a somewhat similar statute, that appears to be the rule. See *Metropolitan Life Ins. Co.* v. *Wann*, 109 S. W. 2d 470. It appears that the Texas statute requires that the "demand" must be made thirty days before the filing of the suit. *(Metropolitan Life Ins. Co.* v. *Wann, supra*, l. c. 472).

The Arkansas Statute provides that:

"This liability attaches when liability is denied by the insurer and suit is filed."

The underlying purpose for requiring a formal demand as a prerequisite to liability for such a penalty is that the insurer have an opportunity to investigate the claim and pay the amount of the demand without incurring the penalty. The thirty day provision in the Texas Statute answers that purpose. It appears that the Arkansas Supreme Court has construed the Arkansas Statute as not requiring a demand other than the filing of a suit and has accomplished the above stated underlying purpose by allowing the insurer to tender into court and confess judgment for the amount sued for and be relieved of the penalty and attorney fees. *Broadway* v. *Home Ins. Co.*, 155 S. W. 2d 889; *National Fire Ins. Co.* v. *Knight*, 47 S. W. 2d 576. It is true that in those cases there had been a previous demand before suit for a larger amount than claimed in the suit. But that does not alter the principle upon which the cases were determined. The original demands were not the same as those contained in the suit. Hence the institution of the suit contained the first demand for the amount then claimed under the Arkansas decisions.

A new and lesser demand may be made by amendment after the suit is filed in which event if the insurer offers to pay the reduced amount, or asks for time in which to pay, there can be no recovery of the penalty. *Life & Casualty Co.* v. *Sanders*, 292 S. W. 657 (Ark). But when the insurer

elects "to go on and contest the claim on other grounds," and there is a recovery for the amount sued for it becomes liable under the Arkansas Statute for the penalty and attorney fee. *Queen of Arkansas Ins. Co.* v. *Milham*, 145 S. W. 540; *Nat'l Fire Ins. Co. v. Knight, supra.* That is the situation in this case.

We are asked to allow additional attorney fees for this appeal. The fee heretofore allowed by the trial court is adequate. That request is denied.

No reversible error being shown, the judgment is affirmed.

FILED
AUG 8 1955
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 224

TRINITY UNIVERSAL INSURANCE COMPANY, *Petitioner and Appellant Below*

v.

CLYDE E. SMITHWICK, *Respondent and Appellee Below*

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

W. H. RECTOR
R. C. LEFFLER, JR.
901 Pyramid Building
Little Rock, Arkansas

PARKIN PRINTING CO., LITTLE ROCK

INDEX

	Page
STATEMENT	1
ARGUMENT	
I. The Court of Appeals did not ignore any contractual provisions nor did it restrain freedom of contract	4
II. The Prime Contractor is not a necessary party in this case	7
III. The Court of Appeals correctly ruled that this debt matured upon completion of Smithwick's work	8
IV. Penalty and attorney's fees were properly allowed under Arkansas Statutes	11
CONCLUSION	15

INDEX—(Continued)

CITATIONS

Cases:

Page

Aetna Casualty & Surety Co. *v.* Henslee
163 Ark. 492, 260 SW 413 ..... 5, 8

Broadway *v.* Home Ins. Co., 155 SW 2d 889 14

Detroit Fidelity & Surety Co. *v.* Yaffee Iron & Metal Co.
184 Ark. 1095, SW 2d 1085 8

Freidman *v.* Schleuter, 105 Ark. 580, 587, 152 SW 129 10

Holcomb *v.* American Surety Co., 184 Ark. 449, 42 SW 2d 765 ..... 6, 8

Home Life & Accident Insurance Co. *v.* Scheuer,
162 Ark. 160, 258 SW 648 13

Huddleston *v.* Home Life Ins. Co. of N. Y.,
182 Ark. 1036, 34 SW 2d 221 13

Johnson *v.* Flynn, 179 Ark. 253, 15 SW 2d 327 5

Life & Casualty Co. *v.* Sanders, 292 SW 657 14

Liverpool & London & Globe Ins. Co. *v.* Jones
207 Ark. 237, 180 SW 2d 519 12

Metropolitan Life Ins. Co. *v.* Shane, 98 Ark. 132, 135 SW 836 14

National Fire Ins. Co. *v.* Knight, 47 SW 2d 576 14

Rutherford *v.* Kahler, 174 Ark. 894, 289 SW 9 5

United States *v.* John Kerns Construction Co.
8 Cir., 144 F. 2d 792, 152 A.L.R. 1340 5

United States for use and benefit of Magnolia Petroleum
Co. *v.* H. R. Henderson & Co., et al, D. C. Ark.,
126 F. Supp. 626 13

INDEX—(Continued)

STATUTES

	Page
Ark. Stats., 1947, Ann., Vol. 6, Sec. 66-201	12
Ark. Stats., 1947, Ann., Vol. 6, Sec. 66-514	12

SUPREME COURT OF THE UNITED STATES

TRINITY UNIVERSAL INSURANCE COMPANY, ... *Petitioner and Appellant Below*

v.

CLYDE E. SMITHWICK, ... *Respondent and Appellee Below*

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

STATEMENT

This is an action on a construction bond required of a prime contractor by the statutes of Arkansas. The prime contract was with the City of Pine Bluff for the construction of a sewer system. Smithwick, a subcontractor, filed suit against the surety on this bond claiming a balance due on his subcontracts (R.1-3). Federal jurisdiction is based upon diversity of citizenship.

At the time of the trial the District Court ruled that upon the pleadings and opening statement of counsel, Trinity had admitted all of the material allegations of the complaint and that the burden was upon Trinity to go forward with proof to support its claim of liquidated damages to serve as a set-off (R.31).

Although it did not raise the issue in any pleading before trial, Trinity now contends that Smithwick should not recover because he did not furnish lien waivers, maintenance bond and written approval of the prime contractor as required by the contracts.

Smithwick was called as a witness by Trinity and he was the only witness in the case (R.32). He testified that he furnished a surety bond to secure the payment of labor and materials furnished to him (R.50-51). He contends that because of this and because there are no liens on public works under the law of Arkansas, the waivers of liens were not necessary.

Smithwick testified that he understood that the maintenance bond was filed at the same time the construction bond was filed (R.50-51). There is no evidence to the contrary.

The record reflects that prior to the time this suit was filed the prime contractor filed a suit against the City of Pine Bluff, claiming a balance due for the satisfactory completion of the entire sewer project, including Smithwick's work (R.52-53). Trinity joined in that suit and adopted the prime contractor's allegations (R.53). The prime contractor had previously denied liability to Smithwick for the balance claimed by him but it did not rely upon any of the aforementioned technicalities in so doing (R.42). Smithwick contends that these technicalities were waived.

Trinity does not deny liability (Petition, 19), but it contends that the debt is not due. The subcontracts provided that the prime contractor agreed to pay a certain sum for Smithwick's work (R.8). Payment was to be made periodically of the amounts specified in the engineer's estimate, less 10% (R.10). Other than this, the

subcontracts provided for payment "in accordance with Section 7" of the prime contract and "to such extent as may be provided in the contract" (the prime contract) (R.10). The prime contract does not mention payment from the prime contractor to subcontractors, and the subcontracts did not in definite words prescribe a time for final payment. The Court of Appeals upheld Smithwick's contention that since the contracts do not specify a time for final payment, such payment becomes due and payable upon completion of Smithwick's work which was more than three years ago.

The District Court entered judgment in favor of Smithwick for the full amount of his claim plus 12% penalty and attorney's fees (R.21-31). This award was made under the provisions of Arkansas Statutes 1947, Annotated, Volume 6, Section 66-514 and was affirmed by the Court of Appeals.

ARGUMENT

There is no constitutional question in this case. When it is accurately analyzed it does not even present a novel or unusual question of law or fact. Failing in this, there is no need for review by the Supreme Court.

I

The Court of Appeals Did Not Ignore Any Contractual Provisions Nor Did It Restrain Freedom of Contract

The petitioner first contends that the Court of Appeals has ignored or disregarded provisions of the subcontracts requiring lien waivers, written approval of the prime contractor and a maintenance bond. On the contrary, the Court of Appeals very carefully considered this case and found ample reason in the record to justify their conclusion that these requirements should not bar recovery by Smithwick (Appendix to Petition, 31-33).

At the time of the trial in the District Court Trinity in its pleadings had admitted all of the material allegations of the complaint including the execution of the contracts and the bond, the completion of the work under the contracts and the correctness of the balance claimed by Smithwick (R.13, paragraphs 3, 4, 5).

Trinity never alleged in any pleading that Smithwick had failed to comply with any of the requirements of his subcontracts. Prior to the trial Trinity never mentioned lien waivers, approval of prime contractor or maintenance bonds.

On July 2, 1952, Smithwick finished his work under the subcontracts (R.32).

On July 25, 1952, the prime contractor advised him by letter (Exhibit 17):

"We do not at this time owe you any money • • •" (R.42). This denial of indebtedness was not based upon nor did it mention any failure of Smithwick with respect to lien waivers, written approval of the work by the prime contractor or maintenance bonds.

On November 2, 1952, the prime contractor sued the City of Pine Bluff claiming a balance due for "the satisfactory completion" of the entire sewer project, *including Smithwick's work* (R.52-53). Trinity became a party to that suit and in its pleadings alleged that all work on the sewer project had been completed satisfactorily (R.53). In making these allegations the prime contractor and Trinity must have concluded that, insofar as they were concerned, Smithwick's work had been acceptably completed.

On August 4, 1953, this suit was filed (R.1). Trinity has never contended that the construction work by Smithwick was unsatisfactory or improper, nor did it ever mention these technical provisions of the subcontracts prior to the trial of the case on June 28, 1954.

The conduct of the prime contractor and Trinity is entirely inconsistent with the theory that they were relying upon any technical requirements of the subcontracts. Under these circumstances the law implies a waiver of such requirements. *United States* v. *John Kerns Construction Co.*, 8 Cir., 1944, 140 F. 2d 792, 152 ALR 1340; *Rutherford* v. *Kahler*, 174 Ark. 894, 289 S.W. 9.

In the construction of public improvements, there is no lien for laborers and materialmen. *Johnson* v. *Flynn*, 179 Ark. 253, 15S.W. 2d 327; *Aetna Casualty & Surety Co.*

v. *Henslee*, 163 Ark. 492, 260 S.W. 413. In *Holcomb* v. *American Surety Co.*, 184 Ark. 449, 42 S.W. 2d 765, the Supreme Court of Arkansas stated:

> "Since the improvement in this case was of a public nature, the statutes giving materialmen and laborers a lien for their work do not apply, and the only protection for the payment for labor performed or material furnished is to be found in terms of a bond."

Smithwick testified, and it is not disputed, that he furnished a surety bond to secure the payment of claims for labor and materials furnished to him for his work under the subcontracts (R.50-51). By furnishing this bond Smithwick afforded to the prime contractor and to Trinity the same protection which they would receive from lien waivers. If Smithwick's creditors are unwilling to wait for payment until Smithwick recovers from Trinity, the creditors have adequate recourse against Smithwick's bond.

There is nothing in this record to show that any demand has ever been made by Smithwick's creditors upon the prime contractor or Trinity. In fact, Trinity contends that it was not even aware of these unpaid claims prior to the trial of this case. Trinity cannot show that it has been or can be prejudiced or damaged in any way by Smithwick's failure to furnish waivers of liens which do not exist under the law of Arkansas.

Smithwick testified "that he has not furnished any additional bonds other than the original bonds furnished at the time of execution of the contract; *but it is his understanding that the original bonds included the one-year maintenance bond required under his contracts with Lancaster & Love*" (R.50-51). There is no other evidence on this issue.

The maintenance bond was required to cover a period of one year after completion of the job (R.9, paragraph 3). Smithwick's job was completed July 2, 1952 (R.32); this suit was filed August 4, 1953, and tried June 28, 1954. The bond term expired before this suit was even filed and there is no showing that any maintenance need ever arose wherein the protection of the bond was utilized or required.

It is obvious that the Court of Appeals did not disregard any requirements of the construction contracts nor did it revise the contracts or interfere with freedom of contract. There is no unusual or constitutional question involved in this phase of this case.

II

The Prime Contractor Is Not a Necessary Party in This Case

According to the facts set forth in the complaint and exhibits attached thereto, Smithwick's claim is against the surety on the prime contractor's bond to recover for labor and materials furnished for the construction of the Pine Bluff sewer system, a public improvement (R.1-3). The bond provides: "Unpaid claims for material, labor and supplies * * * shall have a right of action on the bond" (R.5).

This bond was required by and executed under Ark. Stats. 1947, Section 14-604, the pertinent part of which is as follows:

> "All bonds required by any commission or commissioners or board * * * for the construction of any * * * sewer * * * shall be lienable (liable) for all claims for * * * labor and materials expended * * * in connection with the construction of said public * * * works, * * * and all persons holding

such claims shall have a right of action on said bonds."

The bond and the statute both give all claimants, including subcontractors, a direct cause of action against the bonding company. *Aetna Casualty & Surety Co.* v. *Henslee,* 163 Ark. 492, 260 S.W. 414; *Detroit Fidelity & Surety Co.* v. *Yaffe Iron & Metal Co., Inc.,* 184 Ark. 1095, 44 S.W. 2d 1085.

In *Holcomb* v. *American Surety Co.,* 184 Ark. 449, 452, 42 S.W. 2d 765, the Arkansas Supreme Court stated:

> "The third ground of appellees' demurrer was that there was a nonjoinder of necessary parties, in that the contractor was not made a party, * * * This bond, which is hereafter set out, entitles the beneficiaries — the laborers and materialmen — to an action against the obligators * * * Clark was a proper, but not a necessary party * * * they (the appellees) could have themselves made Clark a party if they deemed such action necessary for the preservation of their rights."

Under these decisions and the relevant facts which were apparent from the complaint and attached exhibits, Lancaster & Love was a proper party but not a necessary party. They could have been vouched in by Trinity if Trinity felt that their presence was essential to any interpretation of the contracts, but this was not done, nor did Trinity even call any representative of Lancaster & Love as a witness in the case.

III

The Court of Appeals Correctly Ruled That This Debt Matured Upon Completion of Smithwick's Work

Trinity now would have this Court believe that (1) Smithwick expressly contracted and agreed to await final

payment of his balance until acceptance of the entire job, and (2) that the lower courts ruled that such an agreement was contrary to the statute requiring petitioners bond. These statements are not correct.

The Court of Appeals in its opinion properly ruled that the contracts *did not* provide a definite time for final payment to Smithwick and that under Arkansas law such became due upon completion of his work (Appendix to Petition, 32).

The subcontracts provided that the prime contractor agreed to pay a certain sum for Smithwick's work (R.8). Payment was to be made periodically of the amounts specified in the engineer's estimate, less 10% (R.10). Other than this, the subcontracts provided for payment "in accordance with Section 7" of the prime contract and "to such extent as may be provided in the contract" (the prime contract) (R.10).

The prime contract does not mention payment from the prime contractor to subcontractors. It only provides for partial payments by the owner to the prime contractor and *for a final payment, including the retained percentage, upon acceptable completion of the prime contract.*

The subcontracts did not in definite words prescribe a time for final payment but the parties obviously intended to adopt the same means of determining a time for final payment as that used in the prime contract. They could only have reasonably intended that *final payment to Smithwick would be made upon acceptable completion of the subcontract.*

The correctness of this interpretation is particularly clear in view of the following facts:

(1) Section 5 of the subcontracts provides: "The Contractor agrees to be bound to the Sub-

contractor by all of the obligations that the owner assumes to the Contractor * * *" (R.10);

(2) Section 3 of the subcontracts provides that the appellee originally was granted 180 days to complete his work (the prime contractor had 280 days) and provides further "written approval of said work must be secured from the Contractor before final payment is made hereunder."; (R.7-8).

(3) Paragraph 1 of the prime contract provides: "The Contractor * * * agrees, at its own expense, to furnish all * * * labor * * * and materials * * *."

In *Friedman* v. *Schleuter*, 105 Ark. 580, 587, 152 S.W. 129, the Supreme Court of Arkansas declared:

> "In regard to the time of making payments, it may be said that in the absence from the contract of any provision on the point, the time of making payment is presumed to be the completion of the work."

In Paragraph 8 of the complaint Smithwick alleged that:

> "The work which plaintiff agreed to contruct under the terms of said contracts dated April 30, 1951, has been fully completed and has been accepted by the City of Pine Bluff and is now being used by said City of Pine Bluff" (R.2).

and in answer at Paragraph 4, Trinity stated:

> "This defendant admits the allegations of Paragraph 8 of said petition except the allegation that the work 'has been accepted by the City of Pine Bluff', and in this connection says that while it believes as a matter of law that such work has been accepted by the City of Pine Bluff, there is presently pending litigation in Cause No. 2481, hereinafter more fully set out, wherein the City of Pine Bluff denies that it has accepted the work of the plaintiff herein" (R.13).

Trinity admitted Smithwick's work had been completed. It was completed in an acceptable manner; otherwise, Trinity would not be able to believe, as it alleged, that as a matter of law it had been accepted. Under the subcontracts and the aforementioned law, the balance claimed by Smithwick was due prior to the time this suit was filed.

The Court of Appeals did not rule that an express contract which deferred final payment to some future time was contrary to and prohibited by statute. Such a decision was not possible for the court ruled that there was no such express agreement to defer. When this case was being considered below Trinity argued that the acceptance of partial payments was an *implied* waiver of Smithwick's right to final payment upon completion of his work. The Court of Appeals merely ruled that under the particular facts of this case it was not reasonable to *assume* that such a waiver was intended. (Appendix to Petition, 35.) Certainly no constitutional or unusual question is presented by this ruling.

IV

Penalty and Attorney's Fees Were Properly Allowed Under Arkansas Statutes

Smithwick was awarded judgment for the full amount of his claim (R.21-22) and judgment for penalty and attorney's fees (R.29-30) under Section 66-514, Arkansas Statutes, 1947, which provides:

> "Recovery of Amount Due and Damages.—In all cases where loss occurs and the cargo, fire, marine, casualty, fidelity, *surety*, cyclone, tornado, life, health, accident, medical, hospital or surgical benefit insurance company liable therefor shall fail to pay the same within the time specified in the policy after demand made therefor, such company shall be

> liable to pay the holder of such policy, in addition to the amount of such loss, twelve (12) per cent damages upon the amount of such loss together with all reasonable attorney's fees for the prosecution and collection of said loss. This liability attaches when liability is denied by the insurer and suit is filed * * *" (italics ours).

It will be noted that this statute specifically applies to *surety* insurance companies. In *Liverpool & London & Globe Insurance Co.* v. *Jones,* 207 Ark. 237, 180 S.W. 2d 519, the Supreme Court of Arkansas stated:

> "* * * This legislation (Section 66-514) must be construed in connection with Act 493 of the Acts of 1921 (Sections 7645,*et seq.*, Pope's Digest) (now Section 66-201, Ark. Stats. 1947) * * *."

Section 66-201, Arkansas Statutes of 1947, furnishes definitions for the various types of insurance named in Section 66-514. In Paragraph 7 of Section 66-201, surety insurance is defined as follows:

> "7. Fidelity and Surety Insurance.—Against loss from and default of persons in positions of trust, public or private, and to *guarantee the performance of contracts and obligations other than that of insurance*" (italics ours).

The bond of Trinity guarantees the performance of the prime contract and the obligation for payment of materials and labor under that contract (R.4-5). It clearly comes within the term "surety" as used in Section 66-514 and defined in Paragraph 7 of Section 66-201.

Possibly at first blush a more serious question would be involved in the wording of Section 66-514 wherein it provides that said company shall be liable "to the holder of such policy" for the penalty and attorney's fees. The term "holder" as used in this section has been construed

by the Supreme Court of Arkansas in the case of *Huddleston* v. *Home Life Ins. Co. of New York*, 182 Ark. 1036, 34 S.W. 2d 221. There the Court said:

> "We think, however, that this is not the proper construction of the word 'holder' as employed in the statute we have quoted (Section 66-514, Ark. Stats. 1947). The word has reference not to custody but to beneficial ownership and *the holder is the person or persons who having the right to sue have exercised that right successfully. Entwistle* v. *Travelers Ins. Co.*, 202 P.A. 141, 51 A. 759. The interveners were therefore holders of the policy as well as the bank because they had a beneficial interest in the policy which they enforced by their intervention" (italics ours).

See also: *Home Life & Accident Ins. Co.* v. *Scheuer*, 162 Ark. 160 S.W. 648.

Smithwick was a "holder of such policy" as this term is construed by the Supreme Court of Arkansas. He had a beneficial interest in the bond under consideration, and he had the right to sue and exercised that right successfully.

It does not require extensive argument or citation of authority for an understanding that the bond and the subcontracts, under which the obligation for payment accrued, must be construed together and that if this is done, the time for payment "specified in the policy" is the time when the debt became due under the subcontracts.

In the recent case of *United States for the use and benefit of Magnolia Petroleum Co.* v. *H. R. Henderson & Company, et al*, D.C. Ark., 126 F. Supp. 626, Honorable John E. Miller, District Judge, ruled that penalty and attorney's fees are allowable against a surety company in an action of this nature on a construction bond.

Metropolitan Life Ins. Co. v. *Shane,* 98 Ark. 132, 135 S.W. 836, was a case in which the insurance company did not make any commitment whatever to the insured about payment of his loss. When the insured filed suit, the insurance company made answer in which it denied all liability on the policy. The Supreme Court of Arkansas stated:

> "It is not necessary that there should have been a formal demand for payment of the policy before the penalty for its non-payment would attach. It is only necessary to show facts from which it can be reason inferred that the company understood that payment was demanded and that it refused to make same."

Smithwick testified that he finished his work under the subcontracts on July 2, 1952 (R.32), and that on July 25, 1952, he received a letter, Exhibit 17, from the prime contractor stating: "We do not at this time owe you any money whatever according to the Engineer's estimate" (R.42). Smithwick filed this suit nine months after the prime contractor filed suit against the City of Pine Bluff in which both the prime contractor and Trinity alleged that all work on the sewer project, including Smithwick's work, had been satisfactorily completed (R.52-53).

Trinity had eleven months, from the time this action was filed until trial, in which it could have deposited the controverted funds into the registry of the court and thereby avoided the assessment of penalty and attorney's fees. *Broadway* v. *Home Ins. Co.,* 155 S.W. 2d 889; *Life & Casualty Co.* v. *Sanders,* 292 S.W. 657; *National Fire Ins. Co.* v. *Knight,* 47 S.W. 2d 576. Trinity did not choose to do so. Instead, it has bitterly contested this case and still denies that Smithwick is entitled to recover the balance claimed.

One reasonable inference can be deduced from these facts, to-wit: The prime contractor and Trinity both understood that payment was demanded and they refused to pay. No formal demand for payment was necessary.

To quote from petitioner's argument in the Petition for Certiorari at Page 19: "To this good day, Trinity does not deny liability . . . ." and to paraphrase the remainder of the argument: Trinity simply does not want to pay this just debt *now*.

CONCLUSION

The petition for certiorari and the record in this case do not present questions sufficiently substantial to require consideration by this Court. The petition should be denied.

Respectfully submitted,

W. H. Rector

R. C. Limerick, Jr.
901 Pyramid Building
Little Rock, Arkansas